

118033

21414

Shymone
PLI

DECISION



**THE COMPTROLLER GENERAL
OF THE UNITED STATES**
WASHINGTON, D.C. 20548

FILE: B-204082

DATE: April 6, 1982

MATTER OF: Perkin-Elmer Corporation

DIGEST:

Where specifications are ambiguous and the only two offerors propose on different bases, agency has duty to conduct further discussions to assure offerors compete on same basis.

The Perkin-Elmer Corporation (P-E) protests the award of a contract to Varian Associates, Inc. (Varian), under request for proposals (RFP) N00014-81-R-JA17 issued by the Office of Naval Research (Navy) for a Molecular Beam Epitaxy (MBE) System for use at the Naval Research Laboratory (NRL), Washington, D.C.

The protester contends that Varian's proposal is technically unacceptable because it did not provide microprocessor controls, which P-E contends were required by the specifications. Also, the protester argues that since it did not know that a contract would be awarded based on a proposal without microprocessor controls, the specifications were, in effect, modified, with P-E not being given an opportunity to negotiate. We sustain the protest.

The RFP originally provided, in pertinent part:

"The source assembly must be capable of holding at least 8 oven/furnaces and have appropriate liquid nitrogen cooling and shutters for each oven/furnace. The shutters must be capable of microprocessor control, as well as having the ability for manual operation. The oven/furnace controls should also have microprocessors and manual adjustment capabilities. * * *"

P-E initially offered a system with microprocessors capable of either manual or programmed control for \$308,800. An alternate proposal offered the same system

with the option of manual operation of four of the eight ovens without use of the microprocessor at an additional charge of \$7,525. The system proposed by Varian, the only other offeror, did not have a microprocessor, and its ovens and shutters were manually controlled.

Following review of the proposals, the contracting officer posed several questions to P-E. The contracting officer inquired about the cost of the MBE System if it were to have complete manual control for the eight ovens. In response, P-E explained that for manual control without the microprocessor, each oven required a eurotherm control, which operates in conjunction with an oven temperature control. Each temperature control can accommodate four ovens. The protester offered the additional four eurotherm controls and oven temperature control, priced at a total of \$7,525, for no additional charge in its alternate proposal, thus offering complete manual control of eight ovens without the microprocessor, as well as manual or programmed control through the microprocessor.

At the request of the using activity, the contracting officer amended the above-cited specification in order to be assured that the system would have eight ovens and complete manual control with the capacity "of later expanding to microprocessor control" and requested best and final offers.

As amended, the specifications read:

"The Source assembly must have 8 ovens/furnaces and have appropriate nitrogen cooling and shutters for each oven/furnace. The shutters must be manually operated and have the possibility to expand to microprocessor control. The oven/furnace controls should also have micro-processors and manual adjustment capabilities. * * *"

P-E first learned of this amendment in a telephone conversation with the contract negotiator. P-E alleges that it questioned the meaning of the amended provision and that the contract negotiator "agreed with [protester] that the specification, as amended, required separate (non-microprocessor) manual controls for both the shutters and the furnaces and a microprocessor to control, at a

minimum, the furnaces." Based on the this phone conversation, P-E prepared its final proposal.

The contract negotiator disputes the above recounting of the phone conversation and states that although the protester mentioned microprocessor capability, it did not ask any questions concerning the microprocessor or its capacity, and the negotiator did not interpret the specifications or agree that a microprocessor was necessary.

Concerning the requirement of the cited specification provision, as amended, P-E argues that the specifications required a microprocessor and NRL takes the position that only the capability for future addition of a microprocessor was required.

Upon our reading of the amended specification, we find the second sentence ("have the possibility to expand to microprocessor control") supports NRL's view while the third sentence ("should also have microprocessor and manual adjustment capabilities") lends credence to P-E's interpretation. Taken together, we find the specifications to be ambiguous as to the furnishing of a microprocessor.

However, even assuming the specifications were as clear as NRL contends, we believe NRL should have taken steps to insure the offerors were competing on an equal basis.

Meaningful discussions are to be held with all offerors in the competitive range and in order to be meaningful, discussions in general must point out weaknesses, excesses or deficiencies in proposals so that the Government may obtain the most advantageous contract. Ford Aerospace & Communications Corporation, B-200672, December 19, 1980, 80-2 CPD 439. Where it becomes apparent during the course of negotiations that one or more proposers have reasonably placed emphasis on some aspect of the procurement different from that intended in the solicitation, the proposers are not competing on the same basis unless the difference is removed. 51 Comp. Gen. 621 (1972).

Here, there were only two offerors. Each was interpreting the specification, as amended, differently. While, generally, the cases cited above involved the conduct of initial negotiations, we think the same rule applies where after the submission of best and final offers it is apparent that Government action, such as the issuance of an amendment,

has resulted in a misinterpretation of the Government's requirements. Upon review of the best and final offers, this should have been clear to NRL, especially in view of the conversation between the contract negotiator and the protester, even assuming the Government official's recollection of the conversation is correct, since the negotiator does recall that the protester mentioned the microprocessor. Therefore, a further round of negotiations should have been conducted to assure that the offerors were competing on an equal basis.

While NRL contends that it is unlikely P-E would have reduced its price enough to become the low offeror, we believe this is speculative and that it is impossible to predict what offerors would do based on another round of negotiations.

However, we note the item has been delivered in accordance with the delivery schedule contained in the contract and, therefore, corrective action at this time would not be in the best interest of the Government. However, we are bringing the matter to the attention of the Secretary of the Navy to prevent a recurrence in the future.

for Shilton J. Jordan
Comptroller General
of the United States